COAL ENERGY, INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 89-28 Decided April 18, 1991

Appeal from a decision by Administrative Law Judge David Torbett sustaining Notices of Violation Nos. 87-92-099-004, 87-92-099-006, 87-91-183-007, and Cessation Order No. 87-92-099-003, and denying appellant's motion to reopen the case. Docket Nos. NX 7-137-R, NX 7-158-R, NX 7-161-R, and NX 7-157-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Hearings: Procedure

When an applicant for review of notices of violation and a cessation order fails to appear at a scheduled review hearing, and does not justify such failure, the Administrative Law Judge properly decides the case based upon the record completed at the hearing, despite the absence of evidence in support of the applicant's case.

APPEARANCES: James Lowe, Kingston, Tennessee, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Coal Energy, Inc., has appealed from the September 29, 1988, decision by Administrative Law Judge Torbett, affirming Notices of Violation (NOV) Nos. 87-92-099-004, 87-91-183-007, and 87-92-099-006, as well as Cessation Order (CO) No. 87-92-099-003, issued for failure to abate NOV No. 87-92-099-004.

In his decision, Judge Torbett summarized the facts in this case, which are not in dispute, as follows:

> On May 27, 1987, OSM [Office of Surface Mining Reclamation and Enforcement] Reclamation Specialist James Finley conducted a regular inspection of Applicant's Permit No. 82-A03,

the Westal Preparation Plant, that contained approximately five (5) acres associated with a tipple and washer (R-2). There was no mine and all activity was associated with the crushing and washing of coal. As a result of the inspection OSM issued NOV No. 87-92-099-006 with one count that the sediment basins on the site had reached 70% capacity. As a result there was a potential problem with discharge of sediment and impurities from these basin[s]. Applicant was noted to be in violation of 30 CFR § 816.46(c)(iii)(F). The abatement action required, by June 25, 1987, was to treat the ponds, and remove the waste from the basins in accordance with 30 CFR § 816.81(a)(1)(2)(3)(4)(5) (R-3). This violation was abated in a timely manner and terminated on June 26, 1987 (R-4).

On March 24, 1987, OSM Reclamation Specialist Mitchell Rollings conducted an inspection of Applicant's Permit No. 81-172, a 55-acre mine site with Mines 3 and 3A in Overton County, Tennessee. Inspector Rollings informed Applicant of incipient problems that needed correction to avoid a NOV (R-17). Rollings and Inspector Craig Walker returned on May 27, 1987, and issued NOV No. 87-19-183-007 with three violations: 1) Sediment Pond No. 001 had a 4.5 pH violating 30 CFR 715.17(a) and required chemical treatment to correct the acidity problem; 2) The spillway on Pond 001 had eroded into a gully violating the Act and required rebuilding with gravel to the 21-feet permit specifications, also a sediment trap and filter fence above this pond needed replacement; 3) Revegetation was inadequate over the entire area violating 30 CFR § 715.17(a) and required regrading, planting of trees, and seeding with grass in order to stabilize the surface and prevent erosion (R-18, R-19). The date set for abatement of the three counts was June 29, 1987. This NOV was modified on June 29, 1987, by OSM Inspector Shirley Goodin, terminating violation one, extending the deadline on violation two to August 6, 1987, and modifying violation three, eliminating the requirement for trees (R-20). On August 6, 1987, the NOV was again modified by Goodin to extend the abatement to September 4, 1987, due to the droughty conditions in that part of Tennessee (R-22). On September 4, 1987, violation two was abated; and the abatement time for violation three was extended to October 5, 1987, again due to the impossibility of successfully germinating ground cover in extreme drought conditions (R-33). On October 6, 1987, violation three of the NOV was abated and the NOV terminated (R-24).

On April 15, 1987, OSM Reclamation Specialist James Finley inspected Applicant's Permit No. 218-205 and noted that certain culverts that the permit map required were not in place. (Decision, Sept. 22, 1987, NX 7-161-R, hereafter Decision) [1/] As

1/ Lowe filed an application for temporary relief from CO No. 87-92-009-003, and Judge Torbett convened a hearing on that application

> a result of the missing culverts, there was an overland flow causing material to wash down the haulroad and off the site into the Cox Branch. As a result of this condition Finley issued NOV No. 87-92-099-004 for failing "to maintain haulroad so as to minimize soil erosion and siltation to the offsite areas in violation of 30 CFR § 816.11(c)(1)(2)(3)." (Decision at 2) Corrective action required installation of the missing culverts. Applicant sought a permit revision for one of the three missing culverts, but failed to request revision for the other two. Thus, on June 11, 1987, Inspector Finley issued CO No. 87-92-099-003 for failure to abate NOV No. 87-92-099-004. (Decision at 2) Applicant filed an application for temporary relief and a hearing was held on July 22, 1987. As a result of this hearing, the undersigned in an opinion dated September 22, 1987, denied temporary relief holding that Applicant's proof showed little likelihood of prevailing on the merits. The undersigned held that "the permit plan which was submitted by the Applicant and approved by Respondent clearly sets out the requirement of the placement of these culverts. Applicant, as permittee, had a responsibility to comply with this approved plan until such time that the plan was revised. See Turner Brothers, Inc. v. OSMRE, 92 IBLA 381, 388 (1986)." (Decision at 3)
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> These three cases against Coal Energy, Applicant, were consolidated for hearing on November 16, 1987. That hearing was cancelled and reset for August 2, 1988. On that date the government presented its evidence in both of the untried cases. Mr. Lowe, though properly informed of the hearing, did not appear. In a letter dated August 4, 1988, Mr. Lowe explained that there had been a mine accident on the date of the hearing and that had prevented his appearance. By letter, September 8, 1988, Mr. Lowe requested that the matter be reopened.

(Decision dated Sept. 29, 1988, at 2-3).

Judge Torbett ruled that OSM had "more than met its burden of proof in presenting a prima facie case of the facts of violation in each of these cases." Id. at 4. He stated that while Lowe had "corresponded with this office explaining his reasons for failing to appear at the hearing, * * * [h]is letter of September 8, 1988, stating his reasons for not appearing is not sufficient grounds to reopen these proceedings." Id. In a letter dated August 4, 1988, Lowe asserted:

> Very early [the morning of the hearing] I received a telephone call, concerning a fall that happened at the mine I work at. At the time it was not known if anyone had been hurt or not.

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fn. 1 (continued)
on July 22, 1987. By decision dated Sept. 22, 1987, Judge Torbett denied temporary relief, holding that Lowe's proof showed little likelihood of prevailing on the merits.

> By the time things had calmed down the hearings was probably all over and at that time that situation was at the top of my list. I am sure that you can understand the urgency of the situation.

Judge Torbett emphasized that Lowe had "filed no affidavits setting out a factual basis in support of his reason for not appearing." Id.

Deciding the case on the basis of the record as completed at the hearing, Judge Torbett concluded that Lowe had "presented no evidence contesting the facts found here, and his pleadings, even if taken as true, would not present a sufficient defense." Id. Judge Torbett's summary of the evidence presented by OSM is set forth below:

> The Respondent's evidence has been uncontroverted. In case one, Respondent's evidence was persuasive that the two basins on the tipple were more than at 70% capacity. This condition was rectified by Applicant and the violation was terminated. In case two, Respondent's evidence as to the three violations was persuasive. Violation one and violation two were abated almost immediately; however, violation three took over 90 days to abate. However, the droughty conditions in Tennessee were ample reason for the extensions that were granted, and this violation was also satisfactorily abated. In case three, the undersigned has already amply considered the evidence in his September 22, 1987 opinion and reiterates from that opinion that Applicant had a duty to comply with the approved permit plan until such time as the plan was revised. Thus, the undersigned finds that the Respondent has met its burden of proof in making a prima facie case as to each of the violations and that Applicant has not controverted the evidence presented.

(Decision at 4-5).

[1] Judge Torbett properly decided this case on the basis of the evidence in the record as completed at the hearing. In Thoroughfare Coal Co., 3 IBSMA 72, 88 I.D. 407 (1981), counsel for Thoroughfare failed to appear at the hearing scheduled for consideration of Thoroughfare's application for review of an NOV issued for "failure to cause all drainage from the disturbed area to pass through silt structures" under 30 CFR 715.17(a). The presiding Administrative Law Judge did not require OSM to present testimony from its witnesses assembled for the hearing or to adduce other evidence. Instead, counsel for OSM was instructed to propose an order upholding its enforcement action against Thoroughfare and dismissing the company's application for review with prejudice. Thoroughfare filed a timely appeal from the consequent order and requested a full evidentiary hearing. The Interior Board of Surface Mining and Reclamation Appeals declined to remand the case even though the Administrative Law Judge did not provide a statement of finding of fact as required under 43 CFR

4.1127, "because the record is unambiguous in material respects and supports the administrative law judge's order." 3 IBSMA at 76, 88 I.D. at 408. The Board ruled that "[b]y its voluntary failure to appear at the scheduled review hearing, Thoroughfare waived its right to a hearing and, consequently, the Administrative Law Judge could accept as true the allegations of fact contained in the notice of violation." 3 IBSMA at 77, 88 I.D. at 409. Based upon the record before it, the Board concluded that "OSM made a prima facie showing that it properly exercised its regulatory authority in issuing to Thoroughfare a notice of violation of 30 CFR 715.17(a)." Id. 2/

We agree with Judge Torbett that the uncorroborated assertions in Lowe's letters dated August 4 and September 8, 1988, and repeated in Lowe's statement of reasons to this Board, regarding his failure to appear at the hearing, do not constitute sufficient grounds to reopen the proceedings in this case. Judge Torbett properly decided this case based upon the record before him as completed at the hearing. His conclusion is correct that Lowe "presented no evidence contesting the facts found here, and his pleadings, even if taken as true, would not present a sufficent defense. The Respondent's evidence has been uncontroverted" (Decision at 4). We affirm Judge Torbett's ruling that OSM "has met its burden of proof in making a prima facie case as to each of the violations and that Applicant has not controverted the evidence presented." Id. at 5.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge

2/ In United States v. Orme, 57 IBLA 373, 376 (1981), and in United States v. Franklin, 45 IBLA 54, 58 (1980), the Board ruled that "[w]here a party fails to appear or participate in a hearing as scheduled even though no order postponing the hearing has been issued, the merits of the case may be reached and decided on the basis of the record as completed at the hearing, despite the absence of evidence in support of the party's case."